THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. **SUPERIOR COURT**

The State of New Hampshire

v.

Emmett Callahan

02-S-1790

ORDER

Defendant is charged with one count of violating RSA 632-A:10 ("the child-care prohibition statute") for coaching his five year-old daughter's T-Ball team. He moves to dismiss the indictment, asserting due process violations based on lack of notice and statutory overbreadth, and ignorance or mistake of law. The court held a hearing on this matter on April 11, 2003. Based on the parties' arguments, submissions and the relevant law, the court finds and rules as follows.

In 1986, in the Coos County Circuit Court in the State of Oregon, defendant pled guilty to one count of sodomy in the first degree, a charge levied against him as a result of his sexual contact with his twelve-year-old stepdaughter. The Coos County Court suspended defendant's sentence for five years during which defendant was placed on probation. According to the terms of defendant's probation, he was, among other things, to refrain from knowingly associating with persons under the age of eighteen.

Defendant moved to New Hampshire in 1987. Upon his arrival in New Hampshire, and for ten years thereafter, defendant registered himself as a sex

offender. At the end of ten years, believing he no longer needed to register, defendant ceased to do so. In May, 2002, however, Trooper Jill Rockey of the New Hampshire State Police called defendant and told him he was required to register as a sex offender and had failed to do so. Defendant explained he had registered for ten years and no longer needed to do so. Trooper Rockey told defendant she believed he had to register for life, but agreed to obtain his records from Oregon before making a final determination. Upon investigating defendant's records from Oregon, Trooper Rockey confirmed that defendant was required to register as a sex offender for life. Accordingly, Trooper Rockey contacted defendant and told him he needed to report to the Troop A Barracks to register.

Shortly thereafter, defendant reported to the Troop A Barracks to meet with Trooper Rockey and register. Trooper Rockey explained that defendant had to register for life and informed defendant the list of registered sex offenders is public information. Upon learning the sex offender registry is public information, defendant told Trooper Rockey he was coaching his daughter's T-Ball team and was concerned that his current wife and the parents of the other T-Ball team members would learn about his prior conviction in Oregon. Despite defendant's admission to coaching his daughter's T-Ball team, Trooper Rockey did not bring the child-care prohibition statute to defendant's attention. Rather, after meeting with defendant, Trooper Rockey swore out a warrant for defendant's arrest for violating the statute.

RSA 632-A:10, I provides, in pertinent part, that

> [a] person is guilty of a class A felony if, having been convicted in this or any other jurisdiction of any . . . sexual assault, he knowingly

> undertakes employment or volunteer service involving the care, instruction or guidance of minor children, including, but not limited to . . . a coach . . . .

(1996). This provision became effective on January 1, 1989, three years after defendant pled guilty to and was sentenced for the first degree sodomy charge in Oregon. Defendant allegedly violated the child-care prohibition statute in 2002 in that he

> knowingly, . . . volunteered his services as a coach of a minor children's T-Ball team at the Brentwood Recreation Center, . . . after being convicted of a sexual assault offense in the State of Oregon, to wit, Sodomy in the First Degree, on June 4th, 1986 . . . .

Defendant maintains prosecuting him on the foregoing indictment violates his due process rights because he was never advised and was therefore not aware of the child-care prohibition statute. Defendant asserts that because a violation of the child-care prohibition statute is malum in prohibitum, or a wrong only because is it prohibited[1], due process mandates notice before prosecution. In other words, according to defendant, he should not be expected to know that as a previously-convicted sex offender, he could not lawfully coach his five-year-old daughter's T-Ball team in a public setting, surrounded by other parents and their children. Defendant argues that as a matter of fundamental fairness, he cannot be prosecuted for something he did not and could not be expected to know was unlawful.

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[1] More specifically, malum prohibitum is defined as "[a] wrong prohibited; a thing which is wrong because prohibited; an act which is not inherently immoral, but becomes so because its commission is expressly forbidden by positive law . . . ." BLACK'S LAW DICTIONARY 960 (6th ed. 1990). In contrast, offenses characterized as malum in se are "inherently and essentially evil, that is, immoral in [their] nature and consequences, without any regard to the fact of [their] being noticed or punished by the law of the state. Such are most or all of the offenses cognizable at common law . . . as murder, larceny, etc." Id. at 959.

The State agrees for purposes of this order that the Oregon court, defendant's Oregon probation officer, defendant's New Hampshire probation officer, and the police with whom defendant registered as a sex offender every year never advised him that the child-care prohibition statute had been enacted and created additional restrictions with which he had to comply upon completion of probation. Indeed, the State agrees for purposes of this order that defendant first learned coaching his daughter's T-Ball team was a violation of New Hampshire law when he was arrested on Trooper Rockey's warrant. Nevertheless, the State contends it may prosecute defendant for violating the child-care prohibition statute for two reasons: first, because it defies logic to require an individual to know a law exists before he may be prosecuted; and second, because defendant must have known coaching his daughter's T-Ball team was unlawful due to the increasingly widespread awareness of sex-related offenses and concomitant protections over the past ten years.

In advancing his due process claims, defendant invokes the protections of both the New Hampshire Constitution and the United States Constitution. Because the New Hampshire Constitution provides at least as much protection as the United States Constitution provides in this area, see State v. Bruce, 147 N.H. 37, 40 (2001), the court addresses the defendant's claims under the New Hampshire Constitution, referring to federal authority only to assist in its analysis. See State v. Ball, 124 N.H. 226, 232 (1983).

"No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or

deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land . . . ." N.H. CONST. part I, art. 15. "It is well settled that 'law of the land' in this article means due process of law." State v. Denney, 130 N.H. 217, 220 (1987) (citation omitted). "The ultimate standard for judging a due process claim is the notion of fundamental fairness." Id. (citations omitted) (brackets and ellipses omitted).

In moving to dismiss his indictment for lack of notice, defendant relies in part on Lambert v. People of the State of California, 355 U.S. 225 (1957). In Lambert, the defendant was convicted of violating a provision of the Los Angeles Municipal Code ("the Code") requiring convicted felons to register as such with the municipality upon remaining in Los Angeles for more than five days. The defendant had resided in Los Angeles for seven years during which she had been convicted of forgery, an offense punishable as a felony, but failed to register herself as a convicted felon. She was subsequently charged and convicted of violating the Code. On appeal, the Court held that applying the registration provision of the Code to the defendant violated her right to due process under the Fourteenth Amendment to the United States Constitution. 355 U.S. at 226 – 27.

In so holding, the Court reasoned that a violation of the Code

> is unaccompanied by any activity whatever, mere presence in the city being the test. Moreover, circumstances which might move one to inquire as to the necessity of registration are completely lacking. . . . We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the [Code] can stand. As Holmes wrote in The Common Law, "A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear." Its severity lies in the absence of an opportunity either to avoid the

> consequences of the law or to defend any prosecution brought under it. Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is printed too fine to read or in a language foreign to the community.

Id. at 229-30 (citation omitted).

The holding in Lambert is limited. See, e.g., U.S. v. Freed, 401 U.S. 601, 608-09 (1971) (declining to apply Lambert to possession of unregistered hand grenades under National Firearms Act); U.S. v. Mitchell, 209 F.3d 319, 323-24 (4th Cir. 2000) (recognizing that "Lambert's reach has been exceedingly limited" and declining to apply Lambert to statute making it unlawful for persons previously convicted of misdemeanor domestic violence to possess firearms or silencers); U.S. v. Meade, 175 F.3d 215, 225-26 (1st Cir. 1999) (noting United States Supreme Court has resisted efforts to extend Lambert and declining to apply Lambert to same statute at issue in Mitchell); U.S. v. Horton, 503 F.2d 810, 813 (7th Cir. 1974) (acknowledging Freed Court's limitation on Lambert and holding Lambert inapplicable to statutory provision making it illegal for defendant to receive firearms in commerce as convicted felon); U.S. v. Milheron, 231 F.Supp.2d 376, 379 (D. Me. 2002) (holding Lambert exception to rule that ignorance of law does not excuse criminal behavior inapplicable to defendant's possession of firearm after having been committed to mental institution). Consistent with the foregoing, the court also finds it inappropriate to apply Lambert to the child-care prohibition statute in this case.

Lambert contained unique circumstances not present in this case. For example, in this case the child-care prohibition statute contains an element of

willfulness, in that one may only be convicted upon "knowingly" undertaking to engage in any of the prohibited acts, RSA 632-A:10, whereas in Lambert, the Code was devoid of any element of willfulness either written into the Code or read into the Code by the California courts. 355 U.S. at 227; see also Meade, 175 F.3d at 225 (noting that Code in Lambert imposed strict liability upon convicted felons "for mere presence in [the] municipality"); cf. Milheron, 231 F.Supp.2d at 380 (mens rea element of statute requiring that defendant "knowingly" possess firearm served as notice to defendant). Furthermore, unlike the defendant in Lambert who "mere[ly] fail[ed] to register," defendant's conduct in this case was not "wholly passive." 355 U.S. at 228. Indeed, the act of volunteering to coach his daughter's T-Ball team "requir[ed] voluntary actions and decisions on [d]efendant's part." Milheron, 231 F.Supp.2d at 379.

Moreover, in Lambert, the defendant had been convicted of a felony while living in Los Angeles, but it was merely her continued existence in that city after being convicted that exposed her to further criminal liability. 355 U.S. at 242. The Lambert Court reasoned that the defendant's continued existence in Los Angeles was "unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed." Id. at 243. In this case, defendant argues that, like the defendant's failure to register in Lambert, coaching his daughter's T-Ball team is so innocuous he could not be expected to know he was violating the law by doing so. The court disagrees.

In Meade, the court stated that although the firearms possession at issue in that case is not comparable to the possession of hand grenades at issue in Freed,

"possession of firearms by persons laboring under the yoke of anti-harassment or anti-stalking restraining orders is a horse of a different hue." 175 F.3d at 226. The court reasoned that

> [t]he dangerous propensities of persons with a history of domestic abuse are no secret, and the possibility of tragic encounters has been too often realized. We think it follows that a person who is subject to such an order would not be sanguine about the legal consequences of possessing a firearm, let alone of being apprehended with a handgun in the immediate vicinity of his spouse. . . .
>
> In short, we do not believe that the prohibition of section 922(g)(8) invokes conduct and circumstances so presumptively innocent as to fall within the narrow confines of the Lambert exception.

Id. (citations omitted). Similarly, in Mitchell, the court was not persuaded by the defendant's lack-of-notice argument under Lambert on the basis that the defendant's "conduct in assaulting his wife – the act that led to his misdemeanor domestic violence conviction – put [the defendant] on sufficient notice." 209 F.3d at 323. The Mitchell court, quoting a previous order addressing a due process challenge in the context of a domestic violence restraining order, further stated that "[b]y engaging in aggressive conduct toward his wife and child, defendant removed himself from the class of ordinary citizens to the point where he could not reasonably expect to be free from regulation when possessing a firearm." Id. (quotations and brackets omitted).

In this case, defendant is "laboring under the yoke" of a prior conviction for sexually assaulting his twelve year-old stepdaughter. Id. Specifically, the court finds that defendant, by engaging in the conduct that led to his prior conviction, "removed himself from the class of [other] citizens [of this state]", such that he could not "reasonably expect to be free from regulation" when engaging in certain

activities involving minors. Id. Indeed, defendant himself appears to have questioned the propriety of his coaching activities in light of his prior conviction, given that he immediately expressed concern over the reactions parents of his T-Ball players might have upon seeing his name in the sex-offender registry. The fact that defendant is coaching his daughter's team does not remove the activity from the purview of the Meade and Mitchell courts' reasoning, which this court herein adopts, particularly in light of the fact that defendant's prior conviction involved his then stepdaughter. Therefore, defendant need not have received specific notice regarding the enactment of the child-care prohibition statute and its applicability to him in order to be prosecuted for his alleged violation thereof.

Defendant offers two further arguments in favor of dismissal: an assertion that the child-care prohibition statute is unconstitutionally overbroad and a mistake of law defense. The court finds these remaining arguments without merit.

Defendant maintains the child-care prohibition statute is unconstitutionally overbroad. According to defendant, the statute impermissibly threatens to bar defendant, as well as other parents, from coaching their own children, an activity defendant asserts is one of the joys and responsibilities of parenting.

The State agrees with defendant that if the child-care prohibition statute prevented individuals from parenting their children, the statute would indeed be unconstitutionally overbroad. The State asserts, however, that the child-care prohibition statute does not prevent individuals from parenting their children; according to the State, the statute simply prohibits a specific class of persons from

engaging in certain activities geared primarily towards children, which are not constitutionally protected.

"A statute fails for overbreadth when it sweeps unnecessarily broadly and thereby invades protected freedoms." State v. Haines, 142 N.H. 692, 699 (1998) (citations, brackets and quotes omitted). In other words, "[t]he statute must proscribe behavior normally protected." Id. (citations omitted).

The relevant language of RSA 632-A:10, I makes it a crime for anyone "having been convicted in this or any other jurisdiction of any . . . sexual assault" to "knowingly" engage in "employment or volunteer service involving the care, instruction or guidance of minor children, including, but not limited to . . . a coach . . . ." (1996) (emphasis added). The court agrees with defendant that if the child-care prohibition statute completely barred a parent from coaching his or her child, the statute would not withstand constitutional scrutiny. The child-care prohibition statute, however, does not bar a parent from coaching his or her child under every circumstance. Rather, the plain and unambiguous language of the statute prohibits a parent from coaching his or her child only in the context of employment or volunteered services.

In determining the meaning of the terms "employment" and "volunteer service," the court first considers the plain meaning of the words used in the child-care prohibition statute "according to the common and approved usage of the language." State v. Johnson, 134 N.H. 570, 575-6 (1991) (citation omitted). The court will not construe the terms "employment" and "volunteer service" to implicate one's ability to coach a child under every circumstance, and thus render the statute

unconstitutional, where the terms are susceptible of a definition that would preserve the constitutionality of the statute, id. (citation omitted), as long as the threshold requirement of "an ambiguity that necessitates judicial interpretation" is first met. Bradley Real Estate Trust v. Taylor, Commissioner, 128 N.H. 441, 445 (1986).

Accepting defendant's implied proposition that the child-care prohibition statute contains an ambiguity, namely, that "employment" or "volunteer service" encompasses circumstances where a parent coaches only his or her child, the court finds the constitutionality of the statute may, and therefore must, be preserved. "Employ" is defined as "to use or engage the services of . . . to provide with a job that pays wages or salary . . . ." WEBSTER'S COLLEGIATE DICTIONARY 379 (10th ed. 1993). A "volunteer" is "a person who voluntarily undertakes . . . a service: as . . . one who renders a service . . . while having no legal concern or interest." Id. at 1324. "Service" is defined as "employment as a servant." Id. at 1070. Based on the foregoing definitions, it is clear that a parent coaching only his or her child is not engaging in employment or a volunteer service. Rather, such a parent is simply engaging in a protected parenting activity, such as assisting a child with his or her homework.

Therefore, a parent subject to the child-care prohibition statute could lawfully coach his or her child individually. A parent subject to the statute could not, however, coach his or her child and the child's team members when employed to do so or when volunteering to do so. Defendant has not offered, nor is the court aware of, any authority for the proposition that employment or the opportunity to volunteer as a coach is a protected activity that may not be criminally proscribed.

Thus, the court finds the child-care prohibition statute is not unconstitutionally overbroad.

Finally, defendant asserts dismissal is appropriate in light of his mistake of law defense under RSA 626:3, II (1996 & Supp. 2002). RSA 626:3, II provides that

> [a] person is not relieved of criminal liability because he acts under the mistaken belief that his conduct does not, as a matter of law, constitute an offense unless his belief is founded upon a statement of the law contained in a statute or other enactment, or an administrative order or grant of permission, or a judicial decision of a state or federal court, or a written interpretation of the law relating to the offense officially made by a public servant, agency or body legally empowered with authority to administer, enforce or interpret such law. The defendant must prove a defense arising under this subsection by a preponderance of the evidence.

(1996).

Defendant contends his probation officers were public servants or agents who enforced, and consequently had to interpret, the terms of his probation as ordered by the Oregon court. Defendant maintains that because the terms of his probation only mandated that he refrain from knowingly associating with minors while on probation, he was justified in believing that upon completion of probation he could lawfully associate with minors. According to defendant, he had no way of knowing that such association was illegal.

While the State concedes defendant did not know the child-care prohibition statute had been enacted after his conviction, the State contends defendant cannot prevail on his mistake of law defense because the terms of defendant's probation did not relate to the instant offense, namely, violation of the child-care prohibition statute. In other words, the State construes the clause "relating to the offense" narrowly, as relating to the offense at issue and not to any underlying offenses that

gave rise to the current offense. Therefore, according to the State, defendant cannot prevail on his mistake of law argument because his probation related to the underlying offense of sodomy in the first degree.

Even assuming, without deciding, that "relating to the offense" should be construed broadly so as to encompass underlying offenses, and that probation officers are servants or agents "empowered with authority to administer, enforce or interpret such law," defendant nevertheless cannot prevail on his mistake of law defense. Although defendant argues he relied on the terms of his probation, the essence of his argument is that he relied on the absence of additional information, namely, that RSA 632-A:10 had been enacted and imposed additional, post-probation restrictions on his freedom.

RSA 626:3, II, by its plain language, relieves individuals of criminal liability upon a showing that they relied upon a written interpretation of the law; the statute does not encompass defendant's contention, which is that he was entitled to rely on the absence of such an interpretation. Cf. State v. Sheedy, 125 N.H. 108 (1984) (defendant convicted of willfully intercepting telephone conversations under state statute prevailed on mistake of law defense where he intercepted calls in reliance on letter from Chief Engineer of the Public Utilities Commission leading him to believe his conduct was governed by federal, not state, law). Moreover, defendant does not assert the Oregon court, his probation officers or the police misled him. Cf. State v. Leavitt, 27 P.3d 622, 628 (Wash. Ct. App. 2001) (due process defense successful where court failed to follow statutory notice provisions at sentencing and further misled defendant by giving him written notice inconsistent with law and

implicitly permitted defendant to disobey law); Kipp v. State, 704 A.2d 839 (Del. 1998) (defendant prevailed on mistake of law defense where sentencing judge who referred to plea agreement in plea colloquy failed to inform defendant that notation on agreement regarding possession of weapons was incorrect).

Furthermore, as stated above, defendant was on notice that his ability to knowingly associate with minors may have been curtailed following his prior conviction. Thus, even if RSA 626:3, II encompasses the absence of an interpretation of the law, defendant was on notice that additional restrictions may apply to his involvement with minors by virtue of his prior conviction involving sexual contact with his minor stepdaughter.

Accordingly, for all of the foregoing reasons, defendant's motion to dismiss is **DENIED**.

So **ORDERED**.

Date: April 25, 2003

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PHILIP S. HOLLMAN
Presiding Justice